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Supreme Court, U.S.
FILED
APR 13 2004
OFFICE OF THE CLERK

No. 03-1071

In the

Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory authority of the United States Forest Service to manage public lands includes the authority to preserve in-stream flows for federally protected species by ordering private parties to stop diverting stream water, through ditches they built long ago on federal land, thereby confiscating their water rights vested under state law.

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STATEMENT OF THE CASE

Contrary to the claims of the federal government, this case does not concern the right to use federal land—the Forest Service has not restricted the Petitioners' (Water Owners) use of federal land. Instead, this case concerns the unauthorized condition Respondents (Forest Service) placed on land use permits that strip from the Water Owners their water rights that are vested under state law. Indeed, nothing about the federal land changed. The Water Owners' ditches remain in place on federal land, exactly as they existed prior to the Forest Service's conditions, with one exception—*the ditches are dry*. Appendix (App.) at A-6, D-2.

Consistent with Congress' purposes in the Organic Administration Act of 1897 (Organic Act), 16 U.S.C. § 475, and subsequent federal land management statutes, the Forest Service granted the Water Owners a right-of-way to construct and operate an irrigation ditch on federal land to carry private water from a stream crossing federal land. Now, as a result of consultation pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.*, the Forest Service uses its power to condition use of the irrigation ditch to keep the Water Owners' water in the stream.

No party disputes the Forest Service may regulate federal land. Likewise, no party disputes the Water Owners possess vested state water rights. Instead, the dispute concerns whether the Forest Service has authority to unilaterally alter the vested water rights of the Water Owners by denying them the long-held right to withdraw their irrigation water into the permitted irrigation ditches that cross federal land. In short, does the Forest Service have the authority to appropriate Water Owners' irrigation water for instream uses?

ARGUMENT

I

THE FOREST SERVICE'S CONDITIONS EVISCERATE THE LONG-STANDING DEFERENCE OF THE FEDERAL GOVERNMENT TO STATE WATER LAW DECISIONS

The water at stake in this case is controlled by the State of Washington which embraces the Western states' law of prior appropriation. *Neubert v. Yakima-Tieton Irrigation District*, 814 P.2d 199, 201-02 (Wash. 1991). Almost a hundred years ago, the Water Owners obtained rights to a certain and specific quantity of water from the state. App. at A-4. At that time, the Water Owners wished to take the water and transfer it to their land through a ditch on federal land. The Water Owners obtained a special use permit from the Forest Service to construct and maintain the ditch. App. at A-4, D-2. The Forest Service required the permit for the protection of federal land. *Id.* Now, one hundred years later, the Fish and Wildlife Service and the National Marine Fisheries Service want that water. Rather than apply to the state for a water right, as did the Water Owners and other rights holders, the federal agencies have the Forest Service use the irrigation ditch permit as a vehicle to confiscate Water Owners' vested water rights. In conditioning the land use permit specifically for the purpose of confiscating water, and certainly not to protect its interests in federal land, the Forest Service acted *ultra vires*, outside its delegated authority.

The purported authority of the Forest Service under the Organic Act, 16 U.S.C. § 475, Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. § 528, and Federal Land Policy and Management Act (FLMPA) 43 U.S.C. § 1701, *et seq.*, to reallocate for itself the Water Owners' vested water rights upsets decades of federal deference to state water law. *United States v. New Mexico*, 438 U.S. 696, 702 (1978). This

precedent would grant the United States near plenary power to confiscate private water rights any time the waters travel over federal land. *See* Amicus Brief of the California Farm Bureau Federation in Support of Petitioners at 2 (California's Central Valley, the backbone of California's irrigated agriculture, relies on water emanating from the predominantly federally owned Sierra Nevada and Coast Ranges). As such, this case raises important issues involving water rights and federalism which this Court should address.

A. The Forest Service's Unauthorized Confiscation of Private Water Rights, Vested Under State Law, for the Forest Service's Own Purposes, Is an Important Question This Court Should Review

Water rights hold a special place in right-of-way jurisprudence. Black letter law holds that "a right in real property includes all incidentals possessed by the grantee and without which the property granted cannot be fully enjoyed." *Hunter v. United States*, 388 F.2d 148, 153-54 (9th Cir. 1967). Courts have also long recognized that water rights are property rights under state law and that water rights exist in the *use* of water. *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). Concerning water rights, as with all other property rights, without use of the property, the property has no value. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

Courts have recognized that government has no right to confiscate these rights for its own purposes. In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), water users entitled to water sued the United States alleging a taking of their water right. *Id.* at 314. In circumstances very similar to those here, the Federal Bureau of Reclamation modified its operations pursuant to a Biological Opinion issued by NMFS in order to reserve water instream to protect fish listed under the ESA. *Id.* at 315. The opinion's

conditions decreased significantly the water users' water. *Id.* at 316.

As it does here, the federal government in *Tulare Lake* attempted to justify its water seizure by arguing it merely provided water to benefit listed fish. *Id.* at 316-17. The court rejected the federal government's argument:

> In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. . . . Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.

Id. at 319 (citation omitted).

Similarly here, the Forest Service confiscated vested water rights for itself. However, because the government's *Tulare Lake* argument was a losing one, the Forest Service now argues it is merely regulating the use of federal land—notwithstanding that it has accomplished the same result as in *Tulare Lake*. That result is depriving Water Owners of their water so the Forest Service can use it for federal purposes. Here, the Forest Service employed a permit intended by Congress to regulate land use to, instead, deny vested water rights owners the ability to withdraw their water from their permitted point of diversion so the Forest Service could use the water for its own purposes.

Access to water is an essential element of a water right, especially when that water involves federal land. Courts have also held that the federal government may not deny such access. For example, access over federal land inheres in a right to water on federal land. *Hunter v. United States*, 388 F.2d 148. In

Hunter, a rancher claimed a right to water within the Death Valley National Monument. The Ninth Circuit noted the rancher had lawfully appropriated water under state law and that the appropriation occurred prior to other persons. *Id.* at 153. Thus, the Ninth Circuit held the rancher possessed water rights unimpaired by the federal land reservation, despite having no right to trespass on federal land. *Id.* Moreover, the Ninth Circuit held that although the water right did not include a right to use the land, the law entitled the rancher to access water by some means: "[H]e should be allowed a right of way over those [national monument] lands to divert the water by one of the methods contemplated by the statute." *Id.* at 154.

The Ninth Circuit upheld similar access to state water rights on federal land in *Adams v. United States*, 3 F.3d 1254 (9th Cir. 1993). There, the plaintiff owned two noncontiguous parcels surrounded by national forest land and claimed a right to transport water from one parcel to another across national forest land. *Id.* at 1255, 1260. The Ninth Circuit held the plaintiff's right to the water under state law also entitled him to transport the water from one parcel to another, and that the Forest Service did not possess authority to deny the plaintiff's water use. *Id.* at 1260.

More importantly, the Court of Federal Claims held that vested rights in the use of water flowing through ditches across federal land also entail the ability to access that water *regardless* of whether a property right exists in the right-of-way across federal land. *Hage v. United States*, 51 Fed. Cl. 570 (2002). Similar to the situation in this case, a rancher sued when the federal government extinguished grazing rights and subsequently diverted water for federal use on land the Forest Service managed. *Id.* at 573. The court held the government could not prohibit the rancher from accessing water only to redirect it to another place for federal use. *Id.* at 584.

The Forest Service argues, however, that *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917), supports its authority to regulate water use and access to water on federal land. *See* Brief for the Federal Respondents in Opposition (Opp.) at 10. But, the Forest Service misconstrues this Supreme Court precedent. In *Utah Power*, the federal government sought to enjoin the illegal occupancy of federal land by "squatters" who constructed on federal land, without authority, diversion dams, reservoirs, pipe lines, power houses, and transmission lines. 243 U.S. at 402-03. In other words, in contrast to this case, the government sought to prevent the *trespass* and *illegal occupation* of federal land. *Utah Power* concerned only the right of trespassers to occupy federal land and had nothing to do with the federal government's authority to prohibit private parties' rights to enjoy water rights granted under state law.

Nevertheless, the decision below allows the Forest Service, and by extension any other federal agency with state appropriated water running across its land, to confiscate that water for its own purposes. Such federal agency authority will unsettle any certainty in western water rights determinations and as a practical matter strip from states their primary role in establishing water rights. Thus, this case raises a serious question which should be reviewed by this Court.

B. The Forest Service Declined Traditional Deference to State Rules and Instead Unilaterally Confiscated State Vested Water Rights for Its Own Use Raising Serious Federalism Questions

Washington state water law provides that instream flows, like other uses of water, may be appropriated. Wash. Rev. Code § 90.03.345. These instream uses are recognized and upheld according to their relative priority. *Hubbard v. Washington*, 936 P.2d 27, 29 (Wash. Ct. App. 1997). As with any other appropriation of water, such a water right is "perpetual and operates to the exclusion of all subsequent

claims." *Id.* But the Forest Service ignored this statutory mechanism to obtain instream flows and, instead, took unilateral action to appropriate the Water Owners' already existing vested water rights for their own use. As a result of ditch permit conditions designed to restrict Water Owners' ability to divert their water, the Water Owners will lose access to their water and the Forest Service will have provided for itself, outside the process established by Washington State, a water right for instream flows.

The Forest Service argues, however, that it has not appropriated the Water Owners' water since the Water Owners are not precluded from finding a new point from which to divert their water. Opp. at 12. But, of course, the original point of diversion is an integral component of the water right. Thus, that an owner may seek an amendment to a water right to change a point of diversion does not change the fact the old water right has been confiscated. The Forest Service's commandeering of the Water Owners' vested water rights so it could put it to instream use constitutes an unlawful confiscation of the Water Owner's water right. Forcing the Water Owners to obtain from the state a new point of diversion (assuming one is available) also constitutes an unlawful confiscation of the Water Owners' water rights because, without current access to their water, a water right is useless. *In re Water Rights in Crab Creek & Moses Lake v. Allen*, 235 P. 37, 39 (Wash. 1925).[1]

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[1] The government cites two applications made by a member of the Early Winters Ditch Company to add two new points of withdrawal (two wells) to replace water that can no longer be withdrawn via the Early Winters Ditch and that the applications have been approved by the Department of Ecology. Government's Supplemental Excerpts of Record (SER) at 302. However, this right to seek to amend a water right is in no manner equal to the right already enjoyed by the Water Owners. As a matter of general application, the ability of a water rights holder to avail itself of its water right depends on

(continued...)

Thus, merely arguing the Water Owners "can get their water somewhere else" cannot justify the Forest Service's permitting actions to deny the Water Owners present use of their water.

Thus, the Forest Service has unilaterally created for itself a de facto water right at the direct expense of the hundred-year-old, vested water right enjoyed by the Water Owners. This action is unprecedented and conflicts with the traditions of Western water law whereby states established water rights are deferred to by the federal government. *United States v. New Mexico*, 438 U.S. at 702. Certiorari should be granted to put a halt to this federal government strategy to obtain through unilateral allocation the rights to waters crossing their land, even though those rights are already possessed by others.

II

THE FOREST SERVICE MISCHARACTERIZES THIS COURT'S PRECEDENT

The Forest Service relies heavily on two cases, but misinterprets both. First, the Forest Service maintains the actions of the Forest Service to impose minimum stream flow requirements do not establish a water right. *See PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 720-21 (1994), and that the water rights themselves have not been regulated or appropriated. Opp. at 13. Second, despite the fact that "[n]ational forests were not to be reserved

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[1] (...continued)
whether or not the change in diversion point would damage the rights of a junior water rights holder. *Haberman v. Sander*, 7 P.2d 563, 565 (Wash. 1932) ("[A] senior appropriator may change his point of diversion, provided that such change does not infringe upon existing vested rights."). That one irrigator was able to amend and obtain permission to drill costly wells to replace the water lost by the Forest Service's appropriation is certainly not a guaranteed right, as such amendments can be protested, objected to, and refused. *See* Government's SER at 303 (protest of Lee Bernheisel).

for aesthetic, environmental, recreational or wildlife preservation purposes," *United States v. New Mexico*, 438 U.S. at 715, the Forest Service maintains that the Organic Act and MUSYA provide sufficient authority for the Forest Service to divert private water rights for the benefit of wildlife preservation.

Jefferson County involved no federal agency nor any federal statute at issue here. Rather, it dealt merely with whether a minimum stream flow requirement under state law was permissible condition of a section 401 certification under the Clean Water Act. *Jefferson County*, 511 U.S. at 710. This Court noted that a state is allowed to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of state law." *Id.* (citing 33 U.S.C. § 1341(d)). Furthermore, this Court recognized that the Clean Water Act allowed states to impose flow conditions; it did not, however, provide any federal mandate that states do so, nor did it authorize the federal government to impose such restrictions. Indeed, "[s]ections 101(g) and 510(2) [of the Clean Water Act] preserve the authority of each State to allocate water quantity between users . . . ." *Id.* at 720.

The Court's holding in *United States v. New Mexico*, does not support the Agencies' reading of the Organic Act and MUSYA. This Court recognizes that national forest lands exist only to fulfill the dual purposes"'[t]o conserve the water flows, and to furnish a continuous supply of timber.'" 438 U.S. at 707 (quoting 30 Cong. Rec. 967 (1897)). This Court's holding is not specific to the implied reservation-of-water doctrine, but rather to the purposes for which Congress created the national forests, which do not include "for the benefit of fish and wildlife." The Ninth Circuit's decision and the Forest Service's position would improperly expand the "purposes" of the National Forest system to include the advancement of any activity which might benefit fish and wildlife.

The Water Owners do not dispute the state's ability to regulate water rights, including instream flows. But the Ninth Circuit's interpretation of federal law would trump the states' control and allow the confiscation of private water rights which cross federal lands. If the federal government should find that fish or wildlife might benefit from those waters, there is nothing under the Ninth Circuit's new standard which would prevent the federal government from obtaining the use of such waters by unilaterally extinguishing access to private water rights. Such a practice, and the resulting attempts to find new rights to sources of water, will wreak havoc in the West and demands this Court's review.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

DATED: April, 2004.

Respectfully submitted,

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